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No. 91-122

**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
PETITIONER,

v.

RENE ALBERTO RODRIGUEZ, ET AL.,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Rene Alberto Rodriguez, the Regulations and Permits Administration of the Commonwealth of Puerto Rico and Salvador Arana respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the First Circuit's opinion in this case. The opinion is reported at 928 F.2d 28 (1991).

STATEMENT OF THE CASE

Introduction

This case concerns a dispute over a project to develop some 80 acres of land owned by petitioner PFZ Properties, Inc. in an area known as Vacía Talega, east of San Juan. Petitioner has both misstated and overlooked vital facts in the record of this case; and were the Court to grant the Petition it would face a case far different from the one sketched out by petitioner. Respondents are unable to accept the statement of the case which petitioner proffers to the Court and are, therefore, compelled to bring to the Court's attention those facts that evince that this case is far more complex than indicated by petitioner.

The Peculiar Framework of The Dispute

Petitioner PFZ Properties, Inc. is a corporation chartered under the laws of the Commonwealth of Puerto Rico and doing business in Puerto Rico for over three decades as a land developer. In 1976, the Puerto Rico Planning Board approved petitioner's preliminary development plan to build the first phase of a tourist hotel and residential complex ("the project") in a portion of a parcel of land owned by petitioner in Vacía Talega. Much of Vacía Talega is made up of the largest mangrove forest system in Puerto Rico.

Before the project was approved it raised the concern that acres of mangrove forest would be sacrificed inflicting substantial harm on this environmentally sensitive coastal area. The project generated considerable opposition, particularly from federal agencies and area residents. As petitioner concedes, the project was then, and remains today, a source of much controversy. Governor Rafael Hernandez-Colon, then serving his first term in office, backed the project in 1976. The

project was hailed chiefly for its potentially beneficial impact on Puerto Rico's tourism industry, and after public hearings and review of then extant policy guidelines on land use in Vacía Talega the Planning Board approved it.

The Planning Board reviews land use policy for the Governor at the highest executive level: the statute creating the Board makes it an "arm" of the Governor and attaches it to the Office of the Governor. The Governor appoints its members with the advice and consent of the Senate and also designates its Chairman.¹ On November 13, 1987, Governor Hernandez-Colon, now serving his second term in office, announced that his administration would review policy guidelines on land use in Vacía Talega, in response to a bill approved by the Senate in 1986 that would preserve Vacía Talega in its natural state and would allocate funds to acquire petitioner's parcel in Vacía Talega in a condemnation proceeding.

Although the Planning Board had approved development of the first phase of the project in 1976, by November 1987 petitioner had yet to do any work on the project.

A Project Not Pursued In Time To Escape Revisiting

The Planning Board's 1976 resolution approving the project authorized petitioner to prepare construction drawings for the subdivision works of the first section of the project "in compliance with the conditions and requirements established by this Board and other government agencies involved." One of the conditions for approval required petitioner "to obtain the permits required by law or by regulation." The Board's resolution advised petitioner that this resolution approving the prelimi-

¹ P.R. Laws Ann. tit 23 §§ 62a, 62d, 62f. The Board was created for the general purpose of guiding the integrated development of Puerto Rico and to set policies in the areas of development, distribution of population, use of the land and other natural conditions in Puerto Rico. See Sec. 62c.

nary development plan would be in force for a period of one year, and if final construction drawings were not submitted before the resolution expired the case would be "dismissed and filed for all legal purposes." The final construction drawings were to be submitted for approval to the Puerto Rico Regulations and Permits Administration ("ARPE").

On February 24, 1981, ARPE issued a resolution approving the internal preliminary development plan for the blocks in the first section of the project, and authorizing submission of construction drawings (plans) for the project's off-site urbanization works to be reviewed by ARPE engineers (technicians). The 1981 ARPE resolution is a formal document, several pages long, ordaining the conditions under which ARPE was approving petitioner's preliminary development plan in accordance with the planning laws, regulations and the ARPE practice or procedures.

One of the conditions required petitioner to submit "a program and timetable for the construction of the urbanization works." Another condition required petitioner to provide "all the works of public facilities and services such as water, electricity, sanitary sewer system and access roads," because the area to be developed lacked "the necessary infrastructure to serve it." In providing these facilities or services, technically known as "urbanization works", petitioner was to follow "the recommendations and requirements of the government agencies concerned."

In order to allow ARPE to review construction plans for urbanization works and determine that these followed the recommendations of the agencies, petitioner had to prepare the construction plans and submit them to the agencies for their approval *before* submitting the plans to ARPE to be reviewed by ARPE engineers. Once approved by the agencies, the construction plans for urbanization works would be

deemed *final* plans, *i.e.* plans ready to be reviewed by ARPE engineers.

ARPE resolutions authorizing submission of final construction plans are in force for a period of one year and this one-year-limitations period is expressly set forth in the text of the resolutions. Proponents of projects unable to submit *final* construction plans before ARPE resolutions expire must request in writing, before the deadline, that ARPE extend the time. Such requests are customarily granted by ARPE, who issues a new resolution that will be in force for another one-year-period.

As a matter of ARPE written practice and procedure the filing of construction plans that lack the Commonwealth agencies' approval and, therefore, are not final plans does not toll the ARPE resolutions' one-year-limitations period. Petitioner's engineers were familiar with ARPE practice and procedures and knew that ARPE's 1981 resolution approving the internal preliminary development plan and authorizing submission of construction drawings for urbanization works would cease to be in force after February 24, 1982, unless the final construction drawings ready for review by ARPE engineers had been submitted by this deadline.

Petitioner did not submit the final construction plans for review by ARPE engineers nor did it request that ARPE extend the time to file the final plans.

Construction drawings for the project's off-site urbanization works had to incorporate the technical information evincing that petitioner's engineers had submitted the drawings to several Commonwealth agencies that were to provide the project with drinking water, sanitary sewers, storm sewers, electric power and access roads, and that the agencies had given their final approval to these urbanization works. This

technical information on the face of the drawings made them final drawings, ready for ARPE review.

Petitioner states that it "timely" submitted drawings to ARPE and endured "years of delay".² The district court nevertheless found that petitioner's drawings were submitted on February 22, 1982 along with a letter acknowledging that the drawings were not final construction drawings for off-site works.³ Petitioner's letter of February 22, 1982 informed ARPE that the final construction drawings . . . "are now being prepared, and at the appropriate time we will submit them for the consideration and endorsements [of the relevant Commonwealth agencies]."

Petitioner overlooks this fact and misstates the actual ARPE practice when it proffers that submission of its drawings in February 1982 "triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit."⁴ The undisputed fact on record is that petitioner never submitted to ARPE the final construction drawings for the project's urbanization works.

As the district court found, as late in the day as February 26, 1987, that is, *six years* to the date ARPE had issued the resolution authorizing submission of final construction drawing for off-site works, petitioner had yet to submit the final drawings and the only drawings on file with ARPE were the drawings submitted in February 1982 *that lacked the basic information on the urbanization works to serve the project*; a fact which prompted then ARPE administrator Motta to warn petitioner in a letter dated February 26, 1987 ("the Motta letter") that ARPE would dismiss the project, unless petitioner evinced its intent to pursue it by submitting, within one year from the

² "Petition For a Writ of Certiorari . . .", at 4.

³ *Id.*, at A-15.

⁴ *Id.* at 4.

date of the letter, the drawings that should have been submitted in February 1982.⁵

Petitioner distorts the facts and overlooks the actual import of the Motta letter, which is that petitioner by February 1987 had failed to pursue its project after filing construction drawings for urbanization works in February 1982 that lacked the basic information that ARPE engineers would have to review. Petitioner's letter of February 1982 had represented to ARPE that final construction drawings were being prepared and would be submitted for the Commonwealth agencies' approval at a later date; yet, by February 26, 1987 petitioner had not filed the final construction plans for urbanization works ready for review by ARPE engineers. -

The Motta letter of February 26, 1987 stated that ARPE was returning to petitioner the construction drawings that it had submitted in February 1982, because a considerable length of time had elapsed since the Planning Board had approved the project and ARPE could not process the project before the construction drawings had obtained final approval from the relevant Commonwealth agencies.

Contrary to what petitioner states was the practice at ARPE at the time its project was dismissed in August 1988, ARPE's Manual of Procedures authorized the dismissal of a case (project) if a proponent had not filed final construction plans within the one-year-period fixed in the ARPE resolution approving the preliminary development plan. ARPE's February 1981 resolution conditionally approving the preliminary development plan textually advised petitioner that the project

⁵ *Id.*, at A-16. Motta resigned two days after this letter had been typed for his signature. It appears Motta did not ask his personal secretary to mail this letter and, instead, discussed its contents with the ARPE Assistant Administration for Regional Operations. Respondent Rodriguez learned of the existence of this letter when ARPE reviewed the history of the project after petitioner had filed the complaint in December 1987.

would be dismissed, and "filed for all legal purposes", if the resolution expired and final construction drawings for urbanization works that had obtained the endorsements of all relevant agencies had not been filed by the deadline.

Petitioner further states that "consistent with ARPE's ordinary procedures" the Motta letter officially served notice on petitioner "of the status of its drawings" and of the "additional information required to complete their processing."⁶ Petitioner suggests that without knowledge of the contents of this letter, petitioner could not learn of "the status" of the construction drawings it had submitted to ARPE in February 1982. Actually, petitioner *knew* that it had not submitted final construction drawings for off-site works within the one-year period of the 1981 ARPE resolution: the letter that accompanied submission of the drawings on February 22, 1982 acknowledged this much. Petitioner need not have received the Motta letter in order to learn that it had not submitted final construction drawings for urbanization works in February 1982.

During 1986 petitioner frantically tried to revive a project that laid abandoned since February 1982. By then, the winds of yet another controversy over the location of the project in Vacia Talega were churning the Senate. Motta hastily arranged meetings with the heads of several Commonwealth agencies, and in September 1986 also arranged for petitioner to make a personal presentation of the project before the heads of several agencies that were convened in a special meeting.

This concerted effort with the active participation of ARPE ultimately proved unsuccessful. On November 14, 1987 the local press was reporting on the Governor's remarks

⁶ *Id.* at 4.

that the Planning Board would review policy guidelines on land use in Vacia Talega.⁷ Petitioner's statement that by December 1987 the project was "beyond any stage of policy review" (Pet. 5) misstates the facts and seems to overlook that the Planning Board's decision to revisit policy guidelines on land use in Vacia Talega in November 1987 superseded, for the time being, the Board's prior policy on land use in Vacia Talega.

The Non-Issue Over Facts Outside The Pleadings

The district court relied on several facts outside the pleadings because the court granted respondents' motion to dismiss on the eve of trial, after the parties had concluded extensive discovery and their factual allegations had been incorporated in the pretrial order. Respondent Rodriguez had moved for summary judgment and petitioner had duly opposed the motion and filed with the court a large binder of "exhibits", among them, newspaper clippings reporting on the Governor's November 13, 1987 remarks that the Planning Board would review guidelines on land use in Vacia Talega.

The Motta letter of February 26, 1987 and petitioner's letter of February 1982 acknowledging that the drawings it was submitting to ARPE were not final drawings for urbanization works were among the many "exhibits" designated by petitioner as its trial "exhibits". The district court implicitly treated respondents' motion to dismiss as one for summary judgment; but only after petitioner had duly opposed Rodriguez's motion for summary judgment.

Petitioner suggested on appeal that the district court had erred in relying "on selected facts outside the pleadings" when it granted the motion to dismiss. After the court of appeals

⁷ *Id.*, at A-16.

reviewed the district court's judgment disregarding "all factual allegations contained elsewhere in the briefs and in the record",⁸ petitioner argued for the first time in a "Petition for Rehearing" that the court of appeals should have considered other factual allegations submitted in the pretrial order.

The court below noted that petitioner was not only raising the issue for the first time but was, additionally, recanting its former views that the district court should *not* have relied on facts outside the pleadings when it had purported to grant a motion under Rule 12 (b) (6). The court below denied the "Petition for Rehearing".⁹

Several of the facts outside the pleadings on which the district court relied, specifically, the press reports on November 14, 1987 that the Planning Board would review policy guidelines on land use in Vacia Talega, and that the Governor was acting in response to a Senate bill that would preserve Vacia Talega in its natural state and would condemn petitioner's parcel, after the senators who sponsored the bill had called on the Governor to freeze petitioner's project¹⁰ were discussed in a meeting between the president of petitioner and the Governor's Special Advisor on Tourism.

Petitioner nevertheless proffers that during the course of this meeting held in December 1987, its president was told by the Governor's aide that the Governor "had determined some time before to keep the project from going forward for personal and political reasons."¹¹ As the district court held, "the governor's

⁸ *Id.*, at A-2 n.1

⁹ *Id.*, at A-11 and A-12.

¹⁰ *Id.*, at A-16.

¹¹ *Id.*, at 5. Respondents note that petitioner clarified to the district court that its Amended Complaint was *not* pleading a theory that Rodriguez's alleged conduct was motivated by a politically partisan animus in violation of petitioner's First Amendment rights. See, "Petition for a Writ of Certiorari . . .", at A-23 n.8.

remarks in the press that his views on the development of Vacia Talega had changed . . . cannot be characterized as impermissible, even if made with a view to appease voters, rather than for truly environmental reasons. . . ."¹²

Three days after the press reported that the Planning Board would revisit policy guidelines on land use in Vacia Talega, an employee of petitioner's engineering firm visited ARPE and attempted to file the preliminary development plans for structures (buildings) that ARPE had returned to petitioner in March 1982, advising at the time that their filing was premature and not in accordance with the ARPE February 1981 resolution that called for construction drawings for urbanization works to be reviewed first. ARPE told the employee that in light of the Planning Board's decision to review guidelines on land use in Vacia Talega ARPE could not accept the plans.

Since ARPE would not accept the plans, the following day petitioner served them on ARPE by certified mail, return receipt requested, along with a letter telling ARPE that whether or not it decided to approve the plans ARPE had no legal authority to refuse to receive them.¹³

A "Taking" Claim Abandoned

A few days after the president of petitioner met with the Governor's special aide, petitioner, who did not name the Governor nor the Planning Board a defendant to this action, filed a complaint against ARPE and Rodriguez in the district court alleging that their "undue delay and deliberate refusal to

¹² *Id.*, at A-23-24.

¹³ ARPE placed these drawings in the project's case files and mistakenly referred to them nine months later at the time it notified petitioner that it was dismissing the project.

review the construction drawings" amounted to a "taking" of its property without just compensation. Respondents moved to dismiss on the ground, *inter alia*, that this claim was not ripe. The project's case files at ARPE were referred to the ARPE legal department after petitioner filed the complaint.

Before the district court had ruled on respondents' motion to dismiss the complaint petitioner filed the "Amended Complaint" and pleaded its case on three different theories, abandoning the "taking" claim.

The ARPE legal department met with the ARPE engineers who had reviewed the project's case files for Motta in February 1987, and who had then informed Motta that ARPE could not process the project because, among other reasons stated in the Motta letter, the construction drawings for urbanization works on file since February 1982 lacked the basic information relevant to the urbanization works to serve the project. A detailed report on the history of the project was prepared by the engineers, after which ARPE attorneys advised Rodriguez that since petitioner had not met the conditions of the ARPE February 1981 resolution approving the preliminary development plan for the project, ARPE could dismiss the project under Sec. IV (5) of Part I of the Manual of Procedures.

In August 1988, ARPE accordingly notified petitioner in writing that it was dismissing the case, because the final construction drawings for urbanization works had not been submitted for ARPE review while the ARPE February 1981 resolution conditionally approving the preliminary development plan remained in force. Petitioner timely requested a reconsideration of this decision, and filed the Amended Complaint in the district court before ARPE denied reconsideration in December 1988, advising petitioner of its right to seek judicial review of this decision under P.R. Laws Ann. tit. 23 § 72 d.

A decision dismissing a project because the ARPE resolution conditionally approving the preliminary development plan has expired requires the proponent of the project to apply to the Planning Board to reopen the case, if the proponent wishes to resume the case.

*The Amended Complaint:
ARPE's "Established Custom and Practice"*

The Amended Complaint alleged that ARPE had engaged in "undue delay" in processing the construction drawings submitted in February 1982 and had failed to process them in accordance with an "established custom and practice" that obligated ARPE engineers to comment on construction drawings or issue requests for their clarification "within one year" of their submission for ARPE review. Respondents' alleged failure to observe this custom and practice in connection with petitioner's drawings was claimed to have caused the deprivation of petitioner's *substantive* rights protected by the Fourteenth Amendment.¹⁴

Respondents submitted to the district court that as a matter of ARPE regulations and procedures the actual "established custom and practice" at ARPE required engineers reviewing

¹⁴ Petitioner's postulation of a limitations period that allegedly required ARPE engineers to notify of deficiencies in the plans "within one year" of their submission was changed on appeal to "within one year" of the ARPE resolution ("prior to the expiration of the one-year deadline"). Were one to assume *arguendo* that petitioner filed final construction drawings on February 22, 1982, petitioner's reformulation on appeal of the "established custom and practice" would have allowed ARPE engineers just *two days* to review the drawings and ask for their clarification. Actually, under the precertification procedures that applied to petitioner's project at the time no such time limitation was imposed on ARPE engineers; they were to review *final* construction plans "within a reasonable time".

final construction plans to notify proponents of any error or discrepancy, or of information lacking in the *final* plans submitted for review.

The Procedural Due Process Claim In The District Court

A separate paragraph of the Amended Complaint alleged that the August 1988 decision to dismiss the project was not preceded by "notice or an opportunity to be heard" and, therefore, had deprived petitioner of its property rights without procedural safeguards. During the course of the briefing in the trial court petitioner fleshed out this procedural due process claim and argued, under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), that it was entitled to "an opportunity to be heard at a meaningful time and in a meaningful manner" because "where the government decision is made pursuant to 'established state procedure', a hearing prior to the deprivation is ordinarily required."¹⁵

Petitioner *did not claim while the case was in the district court* that ARPE established custom and practice afforded a *predeprivation hearing* before ARPE issued a decision *dismissing* a project; rather, petitioner alleged that it was not afforded *the notice* of the information lacking in its construction drawings that the Motta letter would have afforded had the letter been sent to petitioner. Petitioner claimed that respondents' failure to forward the letter was a deviation from the customary practice and procedure at ARPE of issuing written comments ("notice") of defects in construction plans under review.

¹⁵ "Opposition of Plaintiff PFZ Properties, Inc. to Motion for Summary Judgment of Defendant Rodriguez", at 81; "Opposition of Plaintiff PFZ Properties, Inc. to Motion To Dismiss of Defendants ARPE and Rodriguez", at 43.

The Procedural Due Process Claim In The Court of Appeals

By the time this case reached the court of appeals petitioner's procedural due process claim had become more intricate. Petitioner now claimed that "the established procedure" at ARPE provided *predeprivation process*, because it afforded proponents of construction projects written "notice" of any deficiencies in construction plans and "an opportunity" to correct the plans. Petitioner's brief on appeal offered repeated, purposeful statements that it was *not* challenging the established ARPE customary practice and procedure, and included the remark in a footnote that "ironically, if PFZ challenged the procedures established by ARPE's Manual of Procedures the Court would be required to give 'substantial weight' to ARPE's 'good faith judgments' that the procedures it provides 'assure fair consideration of the entitlement claims of individuals.' *Mathews*, 424 U.S. at 349."¹⁶

To be sure, the established "customary practice and procedure" at ARPE that required ARPE engineers to notify proponents of any defect in the plans under review required, *also*, that proponents submit *final* construction plans for review. As petitioner acknowledged, there was a *written* source for this customary practice and procedure: the ARPE Manual of Procedures which petitioner reproduced in the Addendum to its main brief on appeal. Petitioner could not claim, and did not claim the existence of an *unwritten* source of a "customary" practice or procedure at ARPE.

Petitioner further argued on appeal that respondents departed from established ARPE "customary practice and procedure" when they dismissed petitioner's project, because ARPE and Rodriguez did not serve *written notice* on petitioner

¹⁶ "Brief of Plaintiff-Appellant" at 37 n.70, citing *Mathews v. Elridge*, 424 U.S. 319 (1976).

that the construction drawings submitted in February 1982 had been found wanting. Petitioner alleged that ARPE "without fail" had afforded this *predeprivation process* "in every other case" save petitioner's; adding that respondents' failure to afford petitioner this process was Rodriguez's way of retaliating against petitioner for having filed the complaint against respondents.

*The Actual Scope of the Process Afforded Under
Puerto Rico Law*

Petitioner now misrepresents to this Court that respondents' decision to dismiss the project in August 1988 "was inconsistent with customary ARPE practice and procedure" because respondents "determined that the decision . . . would be made without providing a *predeprivation hearing*." (Pet. at 6). Petitioner suggests that ARPE's customary practice and procedure afforded a *hearing* before ARPE issued decisions *dismissing* construction projects conditionally approved by ARPE resolutions. (Pet. at 8 n.5).

As a matter of Puerto Rico planning statutes, regulations and ARPE Manual of Procedures, ARPE's decisions *dismissing* projects under Sec. IV (5) of Part I of the ARPE Manual of Procedures are notified in writing to all proponents of construction projects which have been preliminarily approved by ARPE resolutions ("approved projects"). These decisions are *not* preceded by any notice or hearing. Proponents adversely affected by decisions dismissing their projects must request, within thirty days from the day they are mailed the decision, that ARPE reconsider the decision.

Judicial review of ARPE adverse decisions after a timely filed motion for reconsideration is *the sole process* that Puerto Rico planning laws afford under P.R. Laws Ann. tit. 23 Sec. 72d. Petitioner availed itself of this process and sought judicial

review of respondents' decision both before the Superior Court and the Supreme Court of Puerto Rico. As a matter of state planning laws, regulations and written manual of "customary practice and procedures" petitioner *cannot claim that respondents departed from ARPE's "established custom and practice" when they dismissed the project without affording a hearing.*

REASONS FOR DENYING THE PETITION

As Regards the First Question Presented in the Petition:

- I. THE COURT NEED NOT REVIEW THIS QUESTION, BECAUSE UNDER PUERTO RICO PLANNING LAWS, REGULATIONS AND ARPE PRACTICE AND PROCEDURES PETITIONER DID NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN RECEIVING A CONSTRUCTION PERMIT.

Respondents exhaustively argued in both courts below that in the factual context of this case the Puerto Rico planning laws, regulations and ARPE's written manual of "customary" practice and procedures do not create in favor of petitioner a constitutionally protected property interest in receiving a construction permit. The lower courts refused to consider this question, although the court of appeals expressed its views that it was "far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law."¹⁷ Respondents have properly preserved this question for review by this Court and now pursue it as one reason for denying certiorari.

Although the question is of the sort usually reserved to the trial court for adjudication, respondents deem the facts found by the district court legally sufficient to conclude that under

¹⁷ "Petition for a Writ of Certiorari . . .", at A-5.

Puerto Rico planning laws, regulations and ARPE practice and procedures petitioner's expectation of receiving a construction permit did not rise to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Constitutionally protected interests originate in extra-constitutional sources: they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Cleveland Bd. of Education v. Loudermill*, 478 U.S. 532, 538 (1985); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause". *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

The facts in the record of this case support a conclusion that petitioner did not have a "legitimate claim of entitlement" in connection with its expectation of receiving a construction permit. Petitioner has both misstated and neglected to state the vital facts in the record of this case that support this conclusion. Some of these facts include those outside the allegations in the Amended Complaint on which the trial court relied, after the parties could not cast even the shadow of a dispute over these material facts that were the product of time-consuming and extensive discovery. Although the courts below assumed the existence of a property interest in connection with petitioner's expectation of receiving a construction permit, the facts on record are sufficient to make a determination to the contrary; and these facts include those which petitioner has both misstated and overlooked.

ARPE's February 1981 resolution was a formal document, several pages long, fixing the conditions under which ARPE

was approving the preliminary development plan for the project's first phase; approval that was also conditioned on petitioner's compliance with the planning laws, regulations and the procedures at ARPE. ARPE was created in 1975 as the "permits division" of the Planning Board. It approves preliminary development plans for construction projects *only after* the Planning Board has followed Puerto Rico planning and zoning laws and regulations in deciding to approve a proposal to develop land.

The conditions under which the ARPE February 1981 resolution was approving petitioner's preliminary development plan for the project's first phase embodied the requirements that the planning laws, regulations and ARPE practice impose on proponents of construction projects applying for a construction permit. Policy considerations of the highest order dictate the formalities attendant to these applications. ARPE issues a *resolution* that incorporates the Planning Board's prior *adjudication* of a proponent's *case*. These formalities are justified by the government's interest in exercising control and supervision over applications for construction permits in Puerto Rico.

ARPE's February 1981 resolution authorized petitioner to submit final construction plans for urbanization works during the one-year-period that the conditional approval of the preliminary development plan would be in force. As petitioner acknowledged in the letter that accompanied submission of its construction drawings on February 22, 1982, these "timely" submitted construction plans were not final plans for the project's urbanization works. Petitioner's letter represented to ARPE that the final construction drawings were under preparation and would later be submitted to the relevant Commonwealth agencies for their approval.

As the Motta letter of February 26, 1987 established, petitioner had yet to submit the final construction plans for urbanization works in February 1987. It remains an undisputed fact in the record of this case that petitioner never filed these plans with ARPE for review by ARPE engineers. During 1986 petitioner contacted ARPE in an eleventh hour attempt to revive a project that laid forsaken since 1982. Nonetheless, there was not much that former administrator Motta could do other than arrange for petitioner to present the project before the Commonwealth agencies in September 1986. *ARPE under Motta's command was unable to process the project in February 1987* because petitioner had not filed final construction drawings for urbanization works in February 1982.

After the whirl of hastily arranged meetings with the Commonwealth agencies and petitioner's presentation of the project to the agencies Motta had no choice but to conclude *what petitioner had known all along*: that petitioner would have to start from scratch and submit the construction drawings with the agencies' approval which petitioner had failed to submit in February 1982. By then, however, it was too late for the project to escape the Planning Board's revisiting of policy guidelines on land use in Vacia Talega.

An additional fact as found by the district court that supports the conclusion that petitioner did not have a "legitimate claim of entitlement" to a construction permit is the Planning Board's decision in November 1987 to review policy guidelines on land use in Vacia Talega. As respondents argued in their brief on appeal petitioner could ill claim an "entitlement" to a construction permit to build a project in Vacia Talega, when environmental or ecological policy could legitimately carry the day.¹⁸ Petitioner overlooks the actual import of the

¹⁸ The Board subsequently advised petitioner that a project in Vacia Talega was still feasible, but that in light of current parameters and new restrictions imposed by, among others, federal legislation on the management of coastal zones the Board could not approve the project as envisioned in 1976.

Governor's November 1987 decision to instruct the Planning Board to review policy guidelines on land use in Vacia Talega, when it states in the Petition that by the time its president met with the Governor's aide in December 1987, the project "*was beyond any stage of policy review and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for review*". (Pet. at 5)

Respondents once more contend that under the Puerto Rico planning laws, regulations and ARPE customary practice and procedures petitioner did not have a constitutionally protected property interest in receiving a construction permit. Respondents submit to the Court that it need not consider the first question presented in the Petition, because in the factual context of this case petitioner did *not* have a "legitimate claim of entitlement" to a construction permit of which respondents could not deprive it without affording notice and an opportunity to be heard. *Board of Regents v. Roth, ante*, 408 U.S. at 577; *Memphis Light, ante*, 436 U.S. at 9.

II. ASSUMING *Arguendo* THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, *Zinerman v. Burch*¹⁹ IS DISTINGUISHABLE AND INAPPOSITE BECAUSE ARPE'S MANUAL OF PRACTICE AND PROCEDURE DOES NOT CHARGE RESPONDENTS WITH A DUTY TO IMPLEMENT PROCEDURAL SAFEGUARDS BEFORE ARPE ISSUES DECISIONS DISMISSING PROJECTS.

Respondents earlier stated that as a matter of Puerto Rico planning laws, regulations and ARPE Manual of Procedures, ARPE does not provide a hearing before it issues a written decision *dismissing* a case on the ground that the ARPE resolution conditionally approving the preliminary development plan is no longer in force. This is a decision expressly authorized by Sec. IV (5) of Part I of the Manual of Procedures. Under P.R. Laws Ann. tit. 23 § 72d the only process afforded is judicial review of this decision, and petitioner availed itself of judicial review both before the Superior Court and the Supreme Court of Puerto Rico. Respondents are not entrusted by the state planning laws, regulations and ARPE Manual of Procedures with a duty to implement any procedural safeguards *before* ARPE dismisses a project on the ground that the ARPE resolution conditionally approving the preliminary development plan is no longer in force.

After this Court announced its decision in *Zinerman* petitioner on appeal concocted a theory of a procedural due process deprivation premised on the alleged existence of "predeprivation process" in ARPE's Manual of Procedures. Petitioner advanced its theory through repeated, purposeful

statements in its brief that it was not challenging the adequacy of ARPE's customary practices and procedures allegedly providing "predeprivation process." Nevertheless, Puerto Rico's planning laws, regulations and ARPE Manual of Procedures do *not* charge respondents with a duty to implement any procedural safeguards *before* ARPE issues decisions dismissing projects. This case is, therefore, distinguishable on its facts from *Zinerman*.

In *Zinerman*, a majority of the Court focused on the extent to which the state's officials were given not only the statutory power and authority to effect the deprivation complained of, but also *the concomitant duty to initiate the procedural safeguards established by state law* to guard against the risk of that deprivation. The *Zinerman* Court was presented with a deprivation of liberty which resulted from the "voluntary" admission of the plaintiff to a mental health facility at a time when he was arguably not competent to give "knowing and informed consent" to his admission.

The Florida state statutes examined by the Court denoted a comprehensive scheme ostensibly foreclosing "voluntary" admissions of mentally incompetent persons; yet, the voluntary admission statute did *not* direct any doctor at the mental facility to determine whether a person being "voluntarily" admitted was, in fact, competent to give the necessary consent. The voluntary admission statute did not direct any official to initiate the "involuntary" admission statutory procedure for those patients thought to be incompetent. The Court expressed that

¹⁹ 494 US ___, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990).

the case did *not* involve a facial challenge to the Florida voluntary admission statute, inasmuch as the plaintiff had apparently conceded that strict compliance with the Florida statutory scheme adequately protected against the liberty deprivation endured by the plaintiff.

As the Court found, the voluntary admission statute gave the officials at the mental health facility broad discretion in admitting patients under the provisions of the statutory scheme but did not provide for procedural safeguards necessary to protect against any potential abuse of that broad discretion. 494 U.S. ____ at ____, 110 S.Ct. at 988. Because the Court found that the risk of exactly the type of liberty deprivation which had occurred was entirely "predictable" at a specific point during the mental health admissions process, 494 U.S. at ____, 110 S.Ct. at 989, the Court concluded that the officials' conduct in failing to implement *the state's statutorily ordained procedural safeguards* was not "random" and "unauthorized" conduct.

Zinermon is, thus, a case of *statutory oversight*; i.e. a case involving a statute that broadly delegated officials the authority to effect the deprivation at issue in that case, and *the failure of that same statute to provide for effective predeprivation safeguards*. It was in view of this *statutory oversight* that the majority in *Zinermon* concluded that the deprivation which had occurred was "predictable" and, as such, not "random." See, *Easter House v. Felder*, 910 F.2d 1387 (7th Cir.) *cert. denied* 111 S.Ct. 783 (1991).

In contrast, the Puerto Rico planning laws, regulations and ARPE's Manual of Procedures do not, as a matter of state law, charge respondents with any duty to implement procedural safeguards *before* they dismiss a project on the ground that the ARPE resolution conditionally approving a plan for the preliminary development of the project has expired, and the

proponent has not met the conditions textually set forth in the resolution before the one-year deadline. The date on which the resolution expired and the failure of a proponent to submit by the deadline the final construction plans are readily ascertainable facts; and they do not warrant the burdening of the state's resources with a requirement that procedural safeguards be implemented *before* a decision is made to dismiss a project, in order to prevent the risk of an erroneous determination.

As a matter of Puerto Rico planning laws, regulations and ARPE practice and procedures no procedural safeguards are provided before ARPE issues decisions *dismissing* projects. *Zinermon* is, therefore, inapposite.

As Regards the Second Question Presented In The Petition:

III. THE SECOND QUESTION IN THE PETITION IS NOT PROPERLY PRESENTED BY THE FACTS OF THIS CASE AND THIS COURT HAS NO OCCASION TO CONSIDER THE ALLEGED SPLIT OF AUTHORITY IN THE CIRCUITS.

The second question in the Petition is so broadly phrased it seems petitioner would ask the obvious. The facts of this case, however, afford no occasion to consider an alleged split of authority in the circuits on the issue whether substantive due process rights are implicated in situations involving the denials of permits. The First Circuit has not carved an exception to the standard of conduct that "shocks the conscience" in this particular context. Petitioner does not cite to a single First Circuit case holding that in this context, a state actor's conduct cannot ever amount to conduct that "shocks the conscience." *Rochin v. California*, 342 U.S. 165 (1952). Nevertheless, petitioner would ascribe to the First Circuit the view that state actor's conduct in the context of disputes involving a developer and state planning or zoning authorities can never rise to the level of conduct that "shocks the conscience."

The record of this case fails to sustain the alleged deprivation of petitioner's substantive due process rights. The facts found by the district court do not support the claim that respondents arbitrarily, capriciously, illegally and with an evil purpose unrelated to the technical merits of petitioner's project deprived petitioner of a construction permit for its project. The facts as found by the district court do not support review of the second question presented in the Petition.

Respondents' decision to dismiss petitioner's project after the ARPE February 1981 had expired and petitioner had not met the conditions under which ARPE had approved the preliminary development plan was a decision not only authorized by Sec. IV (5) of Part I of ARPE's Manual of Procedures but, additionally, by *the text* of the ARPE February 1981 resolution authorizing the submission of final construction plans for the project's urbanization works to be reviewed by ARPE engineers. As presented by the facts of this case respondents' decision was neither arbitrary nor capricious, let alone "illegal."

The factual situation of this case, much more complex than petitioner has indicated to the Court, cautions against the exercise of the Court's discretion to hear a dispute that concerns a matter uniquely in the domain of a state's interest in its land development and environmental policies and its interest in exercising control and supervision over applications for construction permits. The pleading of deprivations of protected rights on a substantive due process theory suggests "caution and restraint". *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion, Powell, J.); *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990) *cert. denied*, 111 S.Ct. 713 (1991) (referring to the "circumscribed precincts patrolled by substantive due process").

The decision of the court below on this point is neither unfair nor inaccurate. The facts of this case would not have supported a finding of a deprivation of substantive due process rights had the court below employed the alternate test of conduct that "shocks the conscience."

Petitioner, to be sure, alleged egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case at ARPE; but the facts as found by the district court did not show that respondents' alleged conduct met either the standard of conduct that "shocks the conscience" — *Rochin, ante*, 342 U.S. at 172, 173 — or the standard that reads into the Fourteenth Amendment an additional requirement of a deprivation of a specific constitutional right. *Chongris v. Bd. of Appeals*, 811 F.2d 36 (1st Cir.), *cert. denied*, 483 U.S. 1201 (1987).

CONCLUSION

For the reasons stated in this brief, the petition for certiorari should be denied.

Respectfully submitted,

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